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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matters of	)	
	)	
Application of	)	
	)	
CAPITOL RADIOTELEPHONE, INC. d/b/a CAPITOL PAGING	)	PR Docket No. 93-231
	)	
For a Private Carrier Paging Facility on 152.480 MHZ in Huntington/Charleston, WV	)	
	)	
Imposition of Forfeiture re	)	
	)	
CAPITOL RADIOTELEPHONE, INC. d/b/a CAPITOL PAGING	)	
	)	
Former Licensee of Station WNSX646 in the PLMRS	)	
	)	
Revocation of Licenses of	)	
	)	
CAPITOL RADIO TELEPHONE, INC. d/b/a CAPITOL PAGING	)	
	)	
Licensee of Stations WNDA400 and WNWW636 in the PLMRS	)	
	)	
Revocation of Licenses of	)	
	)	
CAPITOL RADIOTELEPHONE COMPANY, INC. d/b/a CAPITOL PAGING	)	
	)	
Licensee of Stations KWU373, KUS223, KQD614 and KWU204 in the PMRS	)	

To: Administrative Law Judge Joseph Chachkin

REPLY TO OPPOSITION

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CAPITOL RADIOTELEPHONE COMPANY, INC. (a/k/a Capitol Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a CAPITOL PAGING ("Capitol" or "Capitol Paging"), by its attorney, respectfully replies to the opposition filed by the Wireless Telecommunications Bureau (the "Bureau") under date of August 20, 1997,[1] to Capitol's First Application for Reimbursement under the Equal Access to Justice Act filed herein on February 28, 1997. As shown below, the Bureau's opposition is without merit and should be rejected, and Capitol's application should be granted in full.

The Bureau first argues that Capitol is not entitled to an award because Capitol did not "prevail" in this proceeding, and because the Bureau's position in seeking revocation of Capitol's licenses was "substantially justified". Alternatively, the Bureau argues that portions of the requested award are excessive or otherwise not allowable, and thus that any award, if made, should be reduced. An extended discussion of the errors in the Bureau's lengthy opposition pleading would be oppressive and ureasonably burdensome, in light of the fact that the award sought by Capitol herein is only a small fraction of its actual

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[1] Wireless Telecommunications Bureau's Opposition to Capitol Radiotelephone, Inc.'s First Application for Reimburement under the Equal Access to Justice Act, PR Docket No. 93-231, August 20, 1997 (hereinafter cited as the "Opp.").

expenses incurred in defending against the Bureau's revocation proceeding. Nonetheless, its principal errors will be highlighted.

The Bureau evidently is arguing that because Capitol ultimately was found by the Commission to have committed two miscellaneous violations of its technical operating rules, and paid a total forfeiture of $2,000.00, Capitol cannot be deemed to have "prevailed" in this case. The short answer is that an EAJA award may be made only in connection with "adversary adjudications conducted by the Commission," i.e., in a hearing case. In turn, the only part of this case that qualified it as an "adversary adjudication" is that the Bureau sought revocation of Capitol's licenses on basic qualifications grounds -- not that it accused Capitol of two miscellaneous violations of the Commission's technical operating rules.

Stated another way, the miscellaneous violations for which Capitol paid the $2,000 forfeiture did not and never could have warranted instituting a license revocation proceeding against Capitol, and thus are irrelevant to determining whether Capitol prevailed over the Bureau in this adversary adjudication. On the other hand, with respect to the Bureau's allegations on which the

hearing order was in fact founded, Capitol plainly prevailed in each and every respect.[2]

Similarly meritless is the Bureau's argument that an award is not proper because the Bureau's position in bringing the revocation proceeding was "substantially justified". The Judge's Initial Decision itself plainly forecloses any such conclusion, in its analysis both of RAM's anticompetitive conduct (already highlighted in Capitol's application) and of the Bureau's handling of the case.[3] Among other things, the Judge found that RAM's complaints to the Bureau, which largely precipitated its action against Capitol, "were uncorroborated;" that the Bureau "accepted RAM's version of the facts without question;" that, on the other hand, Capitol's *corroborated* complaints about RAM's conduct "consistently received a deaf ear" from the Bureau; and, generally, that the Bureau accorded "uneven treatment" to RAM's

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[2] The cases cited by the Bureau are readily distinguishable on their facts and do not in fact support its arguments in this case.

[3] The Bureau explicitly has the burden to establish that its position was "substantially justified *in law and fact*". 47 C.F.R. §1.1505(a) (1995). (Emphasis added). Since the Bureau has specifically placed the justification for its conduct at issue by its opposition herein, the Judge's findings concerning both RAM's anticompetitive conduct against Capitol and the Bureeau's handling of the case are clearly relevant and probative. Contrary to the Bureau's argument, they thus properly form part of the administrative record for deciding the "substantial justification" issue.

and Capitol's complaints about each other, to Capitol's detriment. (*See* Initial Decision at ¶62).

Additionally, the Judge found that the Commission's inspectors committed an investigatory error which resulted in one of the serious charges being falsely levied against Capitol, and that the Bureau's staff jumped to an erroneous conclusion about a document prepared by Capitol, which resulted in another serious charge being falsely levied against Capitol. (Initial Decision at ¶114). In short, the record is clear that the Bureau itself failed to act with due care and diligence in investigating RAM's complaints and in deciding to bring revocation proceedings against Capitol. Under any circumstances, therefore, the Bureau's conduct cannot plausibly be said to have been "substantially justified".[4]

Next, the Bureau claims that Capitol's documentation of Witness Peters' fees and expenses is inadequate and should be disallowed. Capitol emphatically disagrees. Capitol has provided a copy of the actual invoice submitted to and paid by Capitol, which is the best possible evidence or "documentation"

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[4] Even disregarding Judge Chachkin's findings and conclusions *arguendo,* the Commission itself tacitly acknowledged the Bureau's shortcomings in handling this case, which by itself would be sufficient to foreclose any conclusion that the Bureau's position was "substantially justified" in this case. *See* Final Decision at ¶¶19-20.

of such charges. Moreover, given that Peters' engagement by Capitol was to opine on the Bureau's case at the hearing, his invoice affords a more than sufficient breakdown of the tasks perfomed to meet the requirements 47 C.F.R. §1.1513 (1995).[5]

Equally without merit is the Bureau's objection to Peters' fee. The Bureau explicitly has the burden of establishing that an award should be disallowed. 47 C.F.R. §1.1505 (1995). All the Bureau claims is that the "Commission *generally* does not retain outside expert witnesses in connection with adjudicatory matters". (Opp. at p. 15). (Emphasis added). This bare assertion is wholly inadequate carry the Bureau's burden to show that the requested award *exceeds the highest rate* at which the Commission pays expert witnesses.

Also without merit is the Bureau's objection to the expenses claimed by both Witness Peters and counsel to Capitol. The rules explicitly state that "an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, *if the attorney, agent or witness ordinarily charges its clients separately for such expenses.*" 47 C.F.R. §1.1506(b) (1995). (Emphasis added). Both Witness Peters and counsel charged

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[5] The October 1, 1995 edition of 47 C.F.R. is cited throughout because that edition contains the version of the rules in effect when the revocation proceeding was initiated against Capitol.

Capitol for expenses precisely in accordance with their ordinary and customary billing practices for all clients. Thus, all such expenses are entirely proper herein; and it is irrelevant to this issue whether other agencies may have different rules, as the cases cited by the Bureau might suggest.

Capitol also opposes the Bureau's challenge to a portion of the time spent by counsel on activities claimed to be non-allowable under EAJA. First of all, it was the Bureau that issued a press release and held a press conference after the Commission meeting in which the Hearing Designation Order was adopted, and it was the Bureau that used those platforms to trumpet to the press that it was sending a message to the industry by going after Capitol. Consequently, the press made several calls to counsel during the course proceedings, in which counsel was called upon as part of its representation of Capitol to respond to the press inquiries. Such actions were clearly part of counsel's legal representation of Capitol, not "public relations efforts" as alleged by the Bureau. Accordingly, they were properly included in the requested award.

To the extent there is anything arguably beyond allowable activities reflected in counsel's time records, they are at most *de minimis* and not fairly separable from clearly allowable charges. Given that the allowable $75.00 per hour fee is such a

small fraction of Capitol's actual legal expense to begin with, Capitol respectfully submits that there should be no reduction in the award as sought by the Bureau.

Finally, Capitol is constrained to comment on the Bureau's continuing course of conduct in this case. Notwithstanding the Judge's clear findings in the Initial Decision that "RAM has been guilty of 'egregious' misconduct in pursuing its anticompetitive conduct" against Capitol (Initial Decision at ¶115 & n. 33); and notwithstanding that the Commission itself acknowledged that RAM engaged in "serious violation of the rules," that the Bureau's "lenient treatment" of this misconduct "may well have been unwarranted, and that the "unresolved questions concerning RAM's conduct ... may be considered by the Bureau to determine if further Commission action against RAM is warranted" (Final Decision at ¶¶19-20); and notwithstanding that various RAM applications are pending before the Commission in which the issue of RAM's conduct has been squarely raised by Capitol,[6] the Bureau has taken no action against RAM whatsoever. Instead, the Bureau

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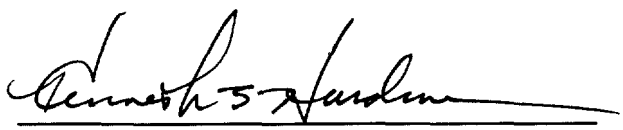
[6] Application for Review, In re American Mobilphone, Inc. and RAM Technologies, Inc. File No. 23792-CD-AL-95 (August 23, 1995)(assignment of Station KFQ936, et al., to RAM); Petition for Reconsideration and Rescission, In re RAM Technologies, Inc., File No. 9502R48248 (May 17, 1995)(renewal of license for Station WNJN621 by RAM); Petition for Reconsideration and Rescission, In re RAM Technologies, Inc., File No. R41680 (April 5, 1995) (renewal of license for Station WNQV776 by RAM).

has elected to devote substantial time and resources to its challenge of Capitol's already meager request for partial reimbursement of fees and expenses that it was improperly forced to bear as a consequence of the Bureau's improvident charges against Capitol in this case.

At a minimum, this rather curious allocation of the Bureau's scarce resources, as well as its rather eccentric sense of justice, speaks volumes about its motivation in opposing Capitol's application. Accordingly, the Bureau's opposition should be evaluated in that light and should be entirely rejected.

Respectfully submitted,

CAPITOL RADIOTELEPHONE COMPANY, INC. d/b/a CAPITOL PAGING

By: 
Kenneth E. Hardman

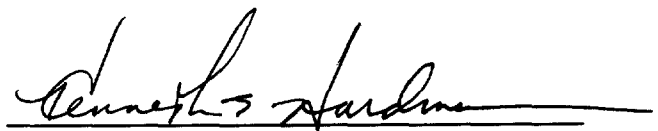
Its Attorney

MOIR & HARDMAN
2000 L Street, N.W.
Suite 512
Washington, D.C. 20036
Telephone: 202-223-3772
Facsimile: 202-833-2416

September 4, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of September, 1997, served the foregoing Reply to Opposition upon the Wireless Telecommunications Bureau by mailing a true copy to Gary P. Schonman, Esquire, Susan A. Aaron, Esquire and John J. Schauble, Esquire, 2025 M Street, N.W., Room 8308, Washington, D.C. 20554, and upon RAM Technologies, Inc. by mailing a true copy thereof to its attorney, Frederick M. Joyce, Esquire, Joyce & Jacobs, 1019 - 19th Street, N.W., 14th Floor, Washington, D.C. 20036.



Kenneth E. Hardman